IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 29, 2008 Session

STATE OF TENNESSEE v. PHILLIP DOUGLAS SEALS

Appeal from the Criminal Court for Anderson County
No. A5CR0082 Donald R. Elledge, Judge

No. E2007-02332-CCA-R3-CD - Filed January 9, 2009

Appellant, Phillip Douglas Seals, was indicted by the Anderson County Grand Jury for two counts of first degree murder and two counts of felony murder. After a jury trial, Appellant was found guilty of all four counts. The trial court merged the felony murder convictions into the two convictions for premeditated first degree murder and imposed concurrent life sentences on Appellant for the convictions. After the denial of a motion for new trial, Appellant seeks review of the following issues on appeal: (1) whether the evidence is sufficient to support Appellant's convictions; (2) whether the trial court properly instructed the jury; (3) whether the trial court erred by prohibiting Dr. Bernet to testify about the effect of Appellant's genetic predisposition to stress on his ability to premeditate; and (4) whether the trial court erred by refusing to grant a new trial on the basis of newly discovered evidence that contradicted the trial testimony of two of the State's witnesses. After a review of the record and the applicable authorities, we determine that the evidence is sufficient to support Appellant's convictions, the trial court properly instructed the jury, the trial court properly excluded unreliable scientific evidence, and the trial court did not err by refusing to grant a new trial on the basis of newly discovered evidence when Appellant failed to establish due diligence in procuring the new evidence. Accordingly, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J. and NORMA MCGEE OGLE, J., joined.

J. Thomas Marshall, Jr. Clinton, Tennessee, for the appellant, Phillip Douglas Seals.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; James N. Ramsey, District Attorney General and Sandra Donaghy, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Appellant was married to one of the victims, Misty Dawn Seals. When they married in 1997, they lived in a home on Heiskell Road in Heiskell, Tennessee. Sometime in 2000, Appellant and Mrs. Seals took custody of two foster children, Dustyn and Ashley. At the time the children moved in, Dustyn was nine years of age and Ashley was around twelve years of age. Appellant and his wife adopted the children approximately one year later. They all lived together in the house on Heiskell Road until January of 2005, when Mrs. Seals and the children moved into the Willow Run Apartments in Clinton, Tennessee.

On February 24, 2005, Mrs. Seals and her friend, Mark Newton, were found shot to death inside the Willow Run apartment. Appellant was arrested and later indicted by the Anderson County Grand Jury for two counts of first degree murder and two counts of felony murder.

At trial, the following evidence was presented. Clinton Police Officer Sean Cusic was dispatched to Willow Run Apartments on February 24, 2005, to investigate a possible domestic situation. When Officer Cusic arrived at the apartment at around 10:40 a.m., no one answered the door. Detective Vaughn Becker soon arrived on the scene, and both officers entered the residence.

Detective Becker entered the apartment and noticed that there was a chain lock on the front door that was connected to the molding on the side of the door. The part of the door holding the chain lock had been broken off and was lying in the floor inside the apartment. As he made his way through the apartment, he also noticed that the bedroom door had been kicked in and the door frame had become separated from the drywall. When Detective Becker entered the bedroom at the end of the hallway, he discovered the bodies of Mrs. Seals and Mr. Newton. Neither person was wearing clothing. Mrs. Seals was lying on her back and Mr. Newton was lying on his left side. Detective Becker was able to see that each of the victims had several bullet holes in their body. Underneath a chair in the bedroom, Detective Becker located a loaded forty-caliber semi-automatic pistol. The officers also found other firearms, including a nine-millimeter pistol, a twenty-two rifle, and a twenty-two pistol.

The officers determined that there was not a suspect in the vicinity and called emergency medical personnel. When medical personnel arrived on the scene, they confirmed that the victims were dead.

Dr. Cleland Blake performed the autopsies on the victims. Mrs. Seals had multiple forty-five caliber gunshot wounds, one to the center of her chest, one to her abdomen, and one to her left arm. The chest wound disrupted the left ventricle of the heart, killing her within a few minutes. Mr. Newton had five gunshot wounds. One of the gunshot wounds was a deadly wound on the right front of the chest that perforated the aorta. There were also four entry wounds in Mr. Newton's back.

Don Carman, a forensic scientist with the Tennessee Bureau of Investigation Crime Lab examined the nine cartridges that were recovered from the crime scene and was able to determine that they were all fired from the same weapon. The weapon that was used in the crimes was not

recovered, but Mr. Carman stated that a forty-five caliber semi-automatic pistol would fire the shells that he examined.

According to James Burns, the manager of Charlie's Super Pawn Shop, Appellant purchased a Charles Daly forty-five caliber handgun on December 4, 2002. Appellant's children testified that there were several guns in their house and that the entire family often went to the shooting range together.

On the morning of the incident, between 9:00 a.m. and 10:00 a.m., Patricia Kreis arose for the day. Mrs. Kreis lived directly across the apartment complex from Mrs. Seals in apartment 284 at Willow Run Apartments. Mrs. Kreis peered out of her blinds, as she did every morning when she woke up. When she looked outside, Mrs. Kreis saw Appellant standing at the door of Mrs. Seals apartment. Appellant looked to the left and right, then opened the door and went inside. Mrs. Kreis did not see Appellant use a key to enter the apartment.

Appellant's brother, Luther Steven Seals ("Steven"), was attending paramedic training on February 24, 2005. At some point that day, Steven received a call from Appellant. Appellant wanted to know if Steven had gotten the message that he left earlier that day. Steven listened to the voice message in which he heard Appellant state that he had "shot them." Steven immediately called Appellant back and asked him what he had done. Appellant informed his brother that he had forced his way into Mrs. Seals apartment and had caught "them" in bed having sex. Appellant threatened Steven, telling him that if Steven contacted the police, Appellant would shoot himself. Appellant asked Steven to pick up his children. Appellant told Steven that he was going to go to Kentucky to create an alibi.

According to Ashley and Dustyn Seals, there were no marital problems between their parents until her mother started spending time with Mr. Newton. Around Christmas of 2004, Dustyn and his sister met Mr. Newton. According to Dustyn, he and his sister had already surmised that their mother was seeing another man.

Ashley remembered that on January 26, 2005, she was awaked between 2:00 a.m. and 3:00 a.m. by the sound her of mother crying. Ashley heard Appellant claim that he had a suicide note. Ashley thought that the argument was about Mrs. Seals's refusal to give Appellant the password to her second cell phone. Ashley called 911. When the police came, Mrs. Seals, the children, and the pets left the family home. This incident precipitated the separation of Appellant and Mrs. Seals. After the incident, Mrs. Seals and the children spent several days in a hotel before moving into the Willow Run Apartments.

Officer Ken Campbell responded to the call about a possible domestic situation on January 26. When he arrived, Mrs. Seals was very upset. She claimed that she was having marital problems and that Appellant pulled a gun on her during an argument. Appellant informed the officer that he found out that day that his wife had rented an apartment and was seeing someone else. Appellant was not taken into custody at that time because Appellant denied possessing a weapon, denied threatening Mrs. Seals, and there were no physical signs to support her statement.

Robert Byrd, the director of Emergency Services for Anderson County, was Appellant's employer beginning in 1999. According to Mr. Byrd, Appellant came into the office in January of 2005, and was upset about the altercation that had occurred between him and Mrs. Seals. Appellant told Mr. Byrd that all of Mrs. Seals's accusations were lies. Appellant admitted that an argument had taken place but claimed that there was no gun involved. Several weeks later, however, Appellant approached Mr. Byrd and told him that he had lied about the altercation with Mrs. Seals. During this conversation, Appellant admitted that he had a gun and that he had threatened his wife. Mr. Byrd ordered that Appellant attend counseling.

After the couple separated, Ashley and Dustyn continued to visit occasionally with their father. When Dustyn stayed with Appellant, he knew that Mr. Newton stayed with Mrs. Seals at the apartment. Dustyn remembered his mother asking him not to tell Appellant about Mr. Newton. Ashley remembered that Appellant took her out to dinner around Valentine's Day and that she and Dustyn went to North Carolina with Appellant for a few days. Appellant spent at least one night at the Willow Run apartment after the couple separated, around February 13, 2005. Ashley thought that was the same day that her mother took Appellant to the hospital. About two weeks prior to his mother's death, Dustyn accompanied Appellant to a hunting expo. Appellant was looking for scopes and silencers for an HK weapon. Appellant purchased a scope at the expo. Neither Ashley nor Dustyn remembered problems between Appellant and their mother before Mr. Newton became a part of their mother's life.

On February 6, 2005, Elsie Fine was at Saint Mary's Hospital in Knoxville, Tennessee. Her daughter was a patient at the hospital. Ms. Fine saw Mrs. Seals in the parking lot talking with Appellant. Ms. Fine recognized Mrs. Seals as one of the nurses who had worked with her disabled daughter. Ms. Fine approached Mrs. Seals to speak with her when she heard Appellant tell Mrs. Seals, "I'm going to kill you if it's the last thing I ever do." Ms. Fine did not stop to talk to Mrs. Seals, instead proceeding to her truck. When Ms. Fine returned to the hospital, the couple was gone. Ms. Fine later saw Mrs. Seals with tears on her face.

Sherry Morrell worked with Mrs. Seals as a nurse at NHC in Oak Ridge. On February 15, 2005, Ms. Morrell saw Mrs. Seals remove several guns from her car and give them to Appellant's brother.

Prior to her death, Mrs. Seals hired attorney Robert Olive to represent her in a divorce action against Appellant. He sent a letter and summons to Appellant on February 23, 2005, the day prior to the victims' death, to notify Appellant that Mrs. Seals wanted a divorce.

Dustyn spent the night with Appellant on February 23, 2005. Around 4:00 a.m., Appellant woke Dustyn up and informed him that he was leaving for work. Appellant worked as a paramedic for Anderson County and also as a flight paramedic for an air ambulance company called LifeNet Medical Services that was based in London, Kentucky. Appellant was originally scheduled to work for LifeNet on February 24, 2005, but he had requested to be off that day during his last shift on

either February 19 or 20, 2005. Dustyn found out about his mother's death around noon on February 24, 2005.

On the morning of February 24, 2005, Mrs. Seals drove Ashley to school. They left through the front door of the apartment. According to Ashley, there was no damage to the front door or her mother's bedroom door at that time.

Chuck Peters was working in the Clinton, Tennessee, 911 Communications Center when a call came in on February 24, 2005, to report a domestic altercation at 262 Willow Run Apartments. The caller reported that an ambulance was needed. Gary Davis, an employee of Anderson County Emergency Medical Service, had worked with Appellant since 1999. He stated that the voice on the 911 recording sounded like Appellant's voice.

After Appellant was arrested, Officer Becker obtained a search warrant for the Heiskell Road residence. There officers located two firearms, neither of which was a forty-five caliber weapon. Officer Becker did locate a receipt for the purchase of forty-five caliber ammunition from Wal-Mart in Jacksboro, Tennessee, dated January 28, 2005. Officer Becker also collected nine forty-five caliber shell casings from a field near Appellant's residence that had been used as a shooting range. According to Donald Carman from the TBI Crime Laboratory, the cartridge cases that came from the crime scene and the cartridge cases recovered from the firing range near Appellant's home appeared to have been fired from the same forty-five caliber pistol. The rifling on the bullets was consistent with the barrel characteristics of pistols made by Chales Daly, Eagle Arms, and Star firearms manufacturers. None of the shell casings found at Appellant's residence were exactly like those found on the firing range.

The State introduced proof at trial to show that prior to the victims' deaths, Appellant had hired Pinnacle Investigations to conduct surveillance on his wife and a suspected boyfriend. Pinnacle Investigations conducted surveillance on Mrs. Seals between February 4 and 21, 2005, for a total of approximately eleven hours. Appellant was given a verbal report of the findings of the surveillance.

Appellant offered proof at trial in his own behalf. Dr. William Bernet, a psychiatrist at Vanderbilt School of Medicine conducted a pretrial forensic psychiatric evaluation of Appellant in June of 2006. Dr. Bernet's primary diagnosis of Appellant was adjustment disorder with depressed mood or, in other words, a mild form of depression. Dr. Bernet opined that Appellant had stressors in his life at the time of the victims' deaths. Specifically, Dr. Bernet stated that Appellant's job was stressful and that Appellant was having serious relationship problems with his wife. Dr. Bernet also arranged for psychological and neurological testing through Dr. James Walker.

According to Dr. Bernet, Appellant was moderately impaired in functioning in relationships at home and with his wife. At the time of the offense, Appellant probably had difficulties with judgment and rationalization. Appellant's ability to cope with stress was impaired by his depression and anxiety. Appellant was also experiencing a high level of paranoia, but Dr. Bernet did not render

a medical diagnosis in regard to the paranoia experienced by Appellant. Dr. Bernet felt that Appellant's ability to premeditate a "crime like this" would have been impaired "to some extent," probably rising to the level of "significant" impairment of judgment and Appellant's ability to "think things through."

The State called Dr. Mark Castelini, the chief psychologist at Ridgeview Psychiatric Center, to rebutt Dr. Bernet's testimony. Dr. Castelini testified that Appellant was competent to stand trial and that the diagnosis of adjustment disorder with depressed mood usually resolved itself within six months of the stressor causing the mental illness.

Appellant took the stand at trial. Appellant described his marriage as good until October or November of 2004, when he discovered Mrs. Seals was at another man's apartment. Mrs. Seals had told Appellant that she was going to stay at a hotel to get away for a little while.

Appellant testified that the January 26, 2005 incident was initiated after he discovered that Mrs. Seals was in possession of a cell phone that she told Appellant she no longer had. Appellant claimed that there was no physical altercation at that time. After this incident, Mrs. Seals got the apartment.

Appellant denied being at Saint Mary's Hospital on February 6, 2005. Appellant testified that he was working for the Campbell County Emergency Medical Service that day. On February 13, 2005, Appellant took Mrs. Seals out for ice cream. Appellant took Mrs. Seals out to dinner on Valentine's Day.[1] Appellant stated that he was not feeling well, and Mrs. Seals insisted on taking him to the Emergency Room at Methodist Medical Center in Oak Ridge, where he received a prescription for Ativan.

He admitted that he went to Mrs. Seals's apartment on February 24, 2005, between 9:30 and 10:00 a.m. to pick her up. The two were supposed to go to Kentucky together so that Appellant could turn in his uniform to LifeNet. Appellant had recently resigned from his full-time position to take a part-time position so that he could be closer to his family. At that time, Appellant was aware that Mrs. Seals was planning to file for divorce.

Appellant opened the door to the apartment with the key he had been given by Mrs. Seals. Appellant stated that he did not see the Mrs. Seals, so he walked toward her bedroom. He heard voices mumbling in the bedroom. Appellant kicked in the bedroom door and saw Mrs. Seals and another man naked in bed. Appellant stated that he picked up a forty-five caliber pistol that was on the bench at the foot of the bed and started shooting in the direction of the moving man. He thought that the man was going for a weapon even though he did not see one in the area. Appellant stated that one of the bullets struck the man and that Appellant continued to fire the weapon at the man until he fell to the floor. Mrs. Seals was on the left side of Appellant and started to walk toward him

[1] During rebuttal proof, the State called Ashley to the stand who testified that Appellant took her to Chili's restaurant and to get her nails done on Valentine's Day.

with her arms up. Appellant fired the pistol at Mrs. Seals, striking her. Appellant then left the apartment, drove to a gas station, and called 911.

Appellant then drove through Lake City, Tennessee, to Norris Dam and threw the pistol into the water. He considered jumping into the lake. Appellant then got back into his car and drove home. Appellant then called his brother to tell him what he had done.

At the conclusion of the proof, the jury found Appellant guilty of two counts of first degree murder and two counts of felony murder. The trial court merged the felony murder convictions with the first degree murder convictions and sentenced Appellant to concurrent life sentences.

Appellant filed a motion for new trial and an amended motion for new trial. After a hearing during which Appellant presented evidence, the trial court denied the motion for new trial. This appeal ensued. On appeal, Appellant argues that: (1) the evidence is insufficient to support Appellant's convictions; (2) the trial court improperly instructed the jury; (3) the trial court erred by prohibiting Dr. Bernet from testifying about the effect of Appellant's genetic predisposition to stress on his ability to premeditate; and (4) the trial court erred by refusing to grant a new trial on the basis of newly discovered evidence that contradicted the trial testimony of Ms. Fine and Ashley.

Analysis

On appeal, Appellant complains that the evidence presented to the jury was insufficient to sustain the convictions. Specifically, Appellant argues that there was no premeditation and that there was no felony being committed. Thus, the evidence was not sufficient to support convictions for first degree murder or felony murder. The State, on the other hand, argues that the proof indicated that Appellant "committed a premeditated act." Further, the State argues that Appellant has waived the issue with respect to his felony murder conviction because he failed to raise it in a motion for new trial. The State also contends that the convictions for felony murder do not rise to the level of plain error.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S .W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from

reweighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions of witness credibility, the weight and value of evidence, and resolution of conflicts in the evidence are entrusted to the trier of fact. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996).

First degree murder is described as:

> (1) A premeditated and intentional killing of another;
> (2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect or aircraft piracy; or
> (3) A killing of another committed as a result of the unlawful throwing, placing or discharging of a destructive device or bomb.

T.C.A. § 39-13-202(a). Tennessee Code Annotated section 39-13-202(d) provides that:

> "[P]remeditation" is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

T.C.A. § 39-13-202(d). An intentional act requires that the person have the desire to engage in the conduct or cause the result. *Id.* § 39-11-106(a)(18). Whether the evidence was sufficient depends entirely on whether the State was able to establish beyond a reasonable doubt the element of premeditation. *See State v. Sims*, 45 S.W.3d 1, 7 (Tenn. 2001); *State v. Hall*, 8 S.W.3d 593, 599 (Tenn. 1999). Whether premeditation is present is a question of fact for the jury, and it may be inferred from the circumstances surrounding the killing. *State v. Young*, 196 S.W.3d 85, 108 (Tenn. 2006); *see also State v. Suttles*, 30 S.W.3d 252, 261 (Tenn. 2000); *State v. Pike*, 978 S.W.2d 904, 914 (Tenn. 1998).

Premeditation may be proved by circumstantial evidence. *See, e.g., State v. Brown*, 836 S.W.2d 530, 541 (Tenn. 1992). Our high court has identified a number of circumstances from which the jury may infer premeditation: (1) the use of a deadly weapon upon an unarmed victim; (2) the particular cruelty of the killing; (3) the defendant's threats or declarations of intent to kill; (4) the defendant's procurement of a weapon; (5) any preparations to conceal the crime undertaken before the crime is committed; (6) destruction or secretion of evidence of the killing; and (7) a defendant's calmness immediately after the killing. *See State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997); *Pike*, 978 S.W.2d at 914-15. This list, however, is not exhaustive and serves only to demonstrate that

premeditation may be established by any evidence from which the jury may infer that the killing was done "after the exercise of reflection and judgment." T.C.A. § 39-13-202(d); *see Pike*, 978 S.W.2d at 914-15; *Bland*, 958 S.W.2d at 660.

One learned treatise states that premeditation may be inferred from events that occur before and at the time of the killing:

> Three categories of evidence are important for [the] purpose [of inferring premeditation]: (1) facts about how and what the defendant did prior to the actual killing which show he was engaged in activity directed toward the killing, that is, *planning activity*; (2) facts about the defendant's prior relationship and conduct with the victim from which *motive* may be inferred; and (3) facts about the *nature of the killing* from which it may be inferred that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design.

2 Wayne R. LaFave, *Substantive Criminal Law* § 14.7(a) (2d ed. 2003) (emphasis in original).

Here, Appellant entered his wife's apartment and kicked in the door to her bedroom after he heard voices inside. Neither of the victims was armed when Appellant entered the room, and the proof at trial did not indicate that there was any form of struggle. Appellant grabbed a pistol and repeatedly shot each of the victims until they were dead. Prior to the shooting, in January of 2005, police had been called to Appellant's house in response to a report of a domestic altercation. When they arrived, they learned that Appellant had allegedly pulled a gun on Mrs. Seals and threatened to kill her and the children. After that incident, Mrs. Seals and the children moved out of Appellant's house. We agree with the State that the evidence was sufficient to sustain Appellant's convictions for first degree murder.

Appellant also challenges his convictions for felony murder on appeal. First, the State argues that Appellant has waived this issue for failure to raise it in a motion for new trial, citing Tennessee Rule of Appellate Procedure 3(e). Appellant concedes that he failed to raise the sufficiency argument with respect to the convictions for felony murder until appeal but contends that because the indictment charged him with committing a murder during a burglary rather than an aggravated burglary, he was convicted of an offense with which he was not charged and this Court should address the matter via plain error review. Failure to raise an issue of error, other than sufficiency of the evidence or sentencing, in a motion for a new trial waives that issue for purposes of appellate review. *See* Tenn. R. App. P. 3(e). Therefore, despite Appellant's failure to raise the issue in a motion for new trial, we may address the sufficiency of the evidence for the felony murder convictions.

However, even though not raised by either party on appeal, we feel compelled to note that these convictions were merged by the trial court into the convictions for first degree murder. Addressing the practical aspects of merger, this Court has observed: "[i]n the circumstance, in which

two guilty verdicts are returned as to alternative charges, the guilty verdict on the greater charge stands and the guilty verdict on the lesser charge merges into the greater charge." *State v. Banes*, 874 S.W.2d 73, 81 (Tenn. Crim. App. 1993) (*rejected on other grounds by State v. Williams*, 977 S.W.2d 101, 105 (Tenn. 1998) (citing *State v. Davis*, 613 S.W.2d 218 (Tenn. 1981)). Under the merger concept, the lesser conviction, in this case, felony murder, is not extinguishe;, it simply merges with the greater offense of first degree murder resulting in one judgment of conviction. Despite our determination that the evidence is sufficient to support the convictions for premeditated first degree murder, we will address the sufficiency of the evidence for Appellant's "merged" convictions for felony murder in the event that further appeal leads to a reversal of the premeditated first degree murder convictions.

In order to prove that Appellant committed felony murder, the State had to prove "[a] killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect or aircraft piracy . . . ." T.C.A. § 39-13-202(a)(2). Tennessee Code Annotated section 39-13-202 also provides that "[n]o culpable mental state is required for conviction under subdivision (a)(2) . . . except the intent to commit the enumerated offenses or acts." T.C.A. § 39-13-202(b). Additionally, the death must occur "in the perpetration of" the enumerated felony. *State v. Hinton*, 42 S.W.3d 113, 119 (Tenn. Crim. App. 2000) (citations omitted). The killing may precede, coincide with, or follow the felony and still be in the perpetration of the felony, so long as there is a connection in time, place, and continuity of action. *State v. Buggs*, 995 S.W.2d 102, 106 (Tenn. 1999). If the underlying felony and killing were part of a continuous transaction with no break in the chain of events and the felon had not reached a place of temporary safety between the events, felony murder is sufficiently established. *State v. Pierce*, 23 S.W.3d 289, 294-97 (Tenn. 2000). Proof of the intention to commit the underlying felony and at what point it existed is a question of fact to be decided by the jury after consideration of all the facts and circumstances. *Buggs*, 995 S.W.2d at 107.

Appellant argues that he should have been indicted for aggravated burglary, which is the burglary of a habitation, rather than simple burglary which is entering a "building other than a habitation." Appellant acknowledges this Court's opinion in *State v. Christopher Shane Harrell*, No. E2005-01531-CCA-R3-CD, 2007 WL 595885, at * 8 (Tenn. Crim. App., at Knoxville, Feb. 26, 2007), *perm. app. denied*, (Tenn. June 25, 2007), in which this Court found that a variance between the indicted predicate felony and the jury instructions and proof was not prejudicial and amounted to harmless error where the felony murder conviction was merged with the defendant's premeditated first degree murder conviction. In *Christopher Shane Harrell*, the State asked the trial court to charge the jury that the felony murder was committed during the perpetration of an aggravated burglary as demonstrated by the proof, rather than during the commission of a burglary as alleged in the indictment. The defendant objected, and the trial court overruled the objection. *Id.* at *7. The defendant was found guilty of both felony murder and first degree murder and on appeal, this Court determined that any error by the trial court was harmless where the proof overwhelmingly supports the first degree murder conviction. *Id.* at *8. Appellant herein argues that *Christopher Shane Harrell* is distinguishable from his case because the evidence is not sufficient to support a conviction

for the offense with which he was charged and the facts do not support the conviction for first degree murder.

We disagree. We have already determined that the evidence is sufficient to sustain Appellant's convictions for first degree murder. We conclude that the analysis set forth by this Court in *Christopher Shane Harrell* applies. Appellant was indicted for felony murder and the indictment alleges that the underlying felony was burglary, in violation of Tennessee Code Annotated section 39-14-402. As in *Christopher Shane Harrell*, "the indictment and the proof substantially corresponded, and the indictment provided [Appellant] with sufficient notice and protection against double jeopardy." 2007 WL 595885, at *8. Appellant does not allege that he was surprised by the proof at trial. Further, while Appellant alleges that he did not kill the victims during the perpetration of a felony, the proof does not support Appellant's claim. He contends that he had "the owner's effective consent to enter the apartment" and that he entered the apartment to pick Mrs. Seals up for a trip to Kentucky, not to commit a burglary. The proof, viewed in a light most favorable to the State, revealed that Mrs. Seals had moved out of the house she shared with Appellant and her name was the only name on the lease. Ashley testified that Appellant did not have a key to the apartment but that her key was "missing" for about a week prior to her mother's death. Moreover, Appellant entered the apartment and kicked in the door to the bedroom where he shot Mrs. Seals and Mr. Newton repeatedly. Consequently, we conclude that the jury was amply justified in finding Appellant guilty of felony murder.

Jury Instructions

Next, Appellant contends that the trial court erred in giving the "acquittal first" charge to the jury, which effectively told the jury not to consider the lesser included offenses if a guilty verdict could be reached on first degree murder. Specifically, Appellant argues that the trial court "instructed the jury that it could not consider the lesser-included offenses . . . unless it found the defendant not guilty of the greater charge and then go down the list of lesser-included offenses only after acquittal of each more serious charge." According to Appellant's argument, "the instructions given by the trial court are of the type that fail to fairly submit the legal issues and mislead the jury thus violating the defendant's right to due process and to a trial by jury." The State disagrees, arguing that the trial court properly instructed the jury.

Appellant objected to this jury instruction on July 11, 2006. After the trial court instructed the jury, Appellant reminded the trial court of his previous objection to the charge. The trial court overruled the objection and instructed the jury on the indicted offenses of first degree murder and the lesser included offenses of second degree murder, voluntary manslaughter, reckless homicide, and criminally negligent homicide. The trial court also instructed the jury not to consider the lesser included offenses unless it first acquitted Appellant of the greater offense.

The issue raised by Appellant was recently addressed by the Tennessee Supreme Court in *State v. Davis*, 266 S.W.3d 896, 904-05 (Tenn. Oct. 17, 2008). The court upheld the "acquittal first" method of giving jury instructions, determining that:

> while a defendant is entitled by our constitution to have the jury charged on all offenses encompassed within the indictment and supported by the proof, our constitution does not go so far as to mandate the order in which those offenses are considered. Our constitution also does not prohibit the requirement that a jury first reach a unanimous verdict of acquittal with respect to a greater offense before it proceeds to consider a defendant's guilt of a lesser-included offense. We therefore reject the Defendant's contention that the trial court's acquittal-first instructions in this case violated his state constitutional right to trial by jury.

Davis, 266 S.W.3d at 905 (footnote omitted). The trial court herein properly gave an "acquittal first" series of jury instructions. Appellant is not entitled to relief on this issue.

Testimony of Dr. Bernet

Appellant also contends that he was deprived of the right to offer evidence that would "negate the existence of mens rea or a culpable mental state" when the trial court refused to allow Dr. Bernet to testify about a biological impairment of Appellant's ability to premeditate the crime. Specifically, Appellant claims that he was "deprived of the opportunity to present relevant, vital evidence to the jury on whether he premeditated this shooting." Appellant claims that this error prevented the jury from discovering a "mental defect" that led to Appellant's actions. The State disagrees, arguing instead that the trial court did not abuse its discretion in excluding the testimony on the subject of genetic predisposition because the trial court found that the evidence was unreliable and would confuse the jury.

Tennessee Rule of Evidence 702 governs the admissibility of expert testimony. It provides:

> If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Tenn. R. Evid. 702 .

Tennessee Rule of Evidence 703 provides that:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

In *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997), our supreme court addressed the admissibility of scientific evidence under Tennessee Rules of Evidence 702 and 703. Citing *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), the court held that evidence and expert testimony regarding scientific theory must be both relevant and reliable before it can be admitted. *McDaniel*, 955 S.W.2d at 265. The court also listed several nonexclusive factors that trial courts may consider when determining the reliability of scientific expert testimony, including:

> (1) whether the scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation.

Id.

Determinations regarding the admissibility of expert testimony are left to the sound discretion of the trial court. *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993). On appeal, our standard of review is whether the trial court abused its discretion by allowing the expert testimony. Before reversing the trial court's determination, we must determine that the record shows that the trial court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999); *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997).

Rule 703 of the Tennessee Rules of Evidence contemplates three possible sources from which an expert may base his/her opinion: (1) information actually perceived by the expert; (2) information made known to the expert by others; and (3) information reasonably relied upon by experts in the particular field. *See* Tenn. R. Evid. 703; *see also* Neil P. Cohen, et. al., *Tennessee Law of Evidence* §§ 7.03(3), 7.03(4), 7.03(5) (5th ed. 2005). In other words, Rule 703 contemplates that inherently reliable information is admissible to show the basis for an expert's opinion, even if the information would otherwise constitute inadmissible hearsay. *See* Tenn. R. Evid. 703. It is not uncommon for an expert witness's opinion to be based on facts or data that are not admissible into evidence but are reliable. *See* Neil P. Cohen et al., *Tennessee Law of Evidence* § 7.03(4).

In the case herein, Appellant sought to admit the testimony of Dr. William Bernet, a psychiatrist at Vanderbilt University. Dr. Bernet was to testify that he has participated in studies of the genetic makeup of individuals and the affects of genetic defects. According to Dr. Bernet, a genetic defect could have made Appellant more susceptible to stress and thus less likely to premeditate the crime at issue. The trial court heard the proposed testimony, then determined:

> [W]ell, as I heard [Dr. Bernet] there is no scientific connection between having the two short alleles and having a mental disease or defect. There is no proof before me today that number one, that this report is trustworthy, whether or not it's scientifically

> valid or reliable. Certainly, this doctor believes in the report, but as he's testified to under oath that - - and I'd already made those findings. Some studies - - most studies have replicated this study, some have not. To me that would indicate it's not necessarily reliable. He says that there's - - he wouldn't even say that those two alleles are even abnormal. He acknowledges that this only applies to two. There's another report that comes out with three that has other variations of the study. There's some that suggest even ten. There's no question it's still a developing science. And to use his words, we're in the learning phrase. As I understood him correctly, I thought that's what he said. I can't find that it's a - - that the theory that he is proposing to introduce before the jury today would aid and assist the jury for many reasons, most of which I've said but reiterating that I can't even find that it's trustworthy nor scientifically valid or reliable, so I will not allow him to do that.

The trial court followed the proper procedure herein. After hearing the proposed testimony, the trial court found that it was unreliable and untrustworthy. *See McDaniel*, 955 S.W.2d at 265. It was within the trial court's discretion to exclude this evidence. Appellant is not entitled to relief on this issue.

Newly Discovered Evidence

Lastly, Appellant claims that the trial court erred by refusing to grant a new trial on the basis of newly discovered evidence. Specifically, Appellant argues that the evidence he offered at the hearing on the motion for new trial corroborated his testimony and contradicted that of two state witnesses. This new evidence allegedly contradicts testimony that was used to establish premeditation and would cause the jury to question the credibility of the State's witnesses. Appellant concludes that if this testimony were available at trial, the result would have been different. The State argues that the evidence would not have changed the outcome of the trial and that the record fully supports the trial court's decision to deny the motion for new trial.

In order to receive a new trial on the ground of newly discovered evidence, a defendant must demonstrate: "(1) reasonable diligence in seeking the newly discovered evidence; (2) materiality of the evidence;" and (3) the likelihood that the evidence would change the outcome of the trial. *State v. Nichols*, 877 S.W.2d 722, 737 (Tenn. 1994) (citing *State v. Goswick*, 656 S.W.2d 355, 358-60 (Tenn. 1983)). Additionally, the decision regarding whether to grant or deny a motion for a new trial predicated on newly discovered evidence "rests in the sound discretion of the trial court." *State v. Walker*, 910 S.W.2d 381, 395 (Tenn. 1995). Moreover, the trial court is authorized to ascertain the "'credibility of newly discovered evidence for which the new trial is asked,'" and the motion should be denied unless the court has assured itself that the testimony would be worthy of belief by the jury. *Id.* (quoting *Rosenthal v. State*, 292 S.W.2d 1, 5 (Tenn. 1956)). When it appears that the newly discovered evidence can have no other effect than to "discredit the testimony of a witness at the original trial, contradict a witness' statement or impeach a witness," the trial court should not order a new trial "unless the testimony of the witness who is sought to be impeached was so important to the issue, and the evidence impeaching the witness was so strong and convincing that a different

result at trial would necessarily follow." *State v. Rogers*, 703 S.W.2d 166, 169 (Tenn. Crim. App. 1985).

At the hearing on the motion for new trial, Appellant introduced bank records in order to try to impeach two of the State's witnesses. Appellant sought to impeach the testimony of Mrs. Fine, who testified that she heard Appellant threaten the victim at the hospital, and his own daughter, who testified that Appellant took her to dinner on Valentine's Day. Appellant argued that his bank records would prove that he was not at the hospital on the day that Mrs. Fine thought that he was there. Further, Appellant claimed that his bank records would prove that he took his daughter out to dinner on February 11 rather than February 14. Appellant argued that his bank records contradicted the testimony and would have changed the outcome of trial.

After hearing the testimony, the trial court determined as follows:

> As to [ground 6], which is the weight to be given to the proof and the testimony of the daughter, Ashley and the lady who was at the hospital. Again there were sufficient jury instructions and statement by this Court concerning what the jurors are to consider. No doubt in my mind that the testimony of both parties, especially the lady who had taken her child there, what she heard and she was very equivocal about [s]he couldn't really say what day or time. She just thought because she was there; she didn't remember exactly; she just knew. As counsel for the state has pointed out to the court, that it was unsettling and that it was something that she remembered, unfortunately, after the fact. She didn't even tell Misty, the deceased, about it, as I recall. As far as Ashley's testimony, we're looking at testimony whether it was the 11th or the 14th, but Ashley too, she wasn't certain. Her testimony basically was she thought she had Valentine's dinner and so forth and had her nails done. The bottom line, too, is the incident itself occurred on [F]ebruary 24th, [2005] and this trial was July of 2005. Certainly plenty of time for this defendant to reconstruct from records that were available to him at all times where he made charges and when, and he has failed to do that. But setting that aside, in and of itself, the testimony from the witnesses are to be given what weight that the jurors placed upon that testimony with specific instructions from this court to give no weight to the attorneys who are arguing to the jury because that's simply not the law and it was verbally given to them on at least one prior occasion and [t]yped and given to them to take back to the jury room.

We find no abuse of discretion in the trial court's denial of Appellant's motion for new trial based upon newly discovered evidence. Appellant has not shown reasonable diligence in producing his bank records. Further, he has not shown that this information would have changed the result of the trial. Appellant testified at trial that he shot the victims multiple times and there is ample other evidence of premeditation other than the testimony of Ms. Fine and Appellant's daughter. We agree

with the trial court that given the overwhelming proof of Appellant's guilt, this information would not have changed the result of the trial. Appellant is not entitled to relief on this issue.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE